

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
DINO YAVUNCU	)	CASE NO. 03-96684-MHM
	)	
Debtor	)	
	)	
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CJH CAPITAL CORPORATION	)	
	)	
Plaintiff	)	<b>ADVERSARY PROCEEDING</b>
	)	<b>NO. 03-9293</b>
v.	)	
	)	
DINO YAVUNCU	)	
	)	
Defendant	)	

**OPINION**

In this adversary proceeding, Plaintiff seeks a determination that its claim against Debtor is nondischargeable under §523(a)(2)(A). Trial was held November 3, 2004, with Debtor proceeding *pro se*. Plaintiff filed a post-trial brief December 15, 2004.

**FINDINGS OF FACT**

On February 19, 2003, in connection with the closing of Debtor's sale of a business to Plaintiff, which included the assignment of a non-residential real property lease, Plaintiff paid to Debtor \$27,500, which included a credit for Defendant's security deposit under the lease. Debtor, in turn, gave Plaintiff a check drawn on his personal checking account in the amount of \$3,446.75, which represented Debtor's obligation for unpaid rent on the business premises. The amount of the security deposit was \$4,500. Debtor declined Plaintiff's offer to deduct the unpaid rent from the amount of the security deposit. Debtor knew that the payment of the unpaid rent

was material to the transaction. Debtor executed an Assignor's Affidavit stating that the business had no outstanding indebtedness. Debtor testified that he asked Plaintiff's representative to hold the check for several days because his account lacked sufficient funds. Plaintiff denies that Debtor said anything about holding the check.

On February 19, 2003, Plaintiff attempted to negotiate the check. It was returned for insufficient funds. Plaintiff again attempted to negotiate the check March 3, 2003. Again, it was returned for insufficient funds. Meanwhile, Debtor had deposited Plaintiff's check in his business checking account. When confronted by Plaintiff about the returned check, Defendant refused to remit funds to Plaintiff or otherwise cure the insufficiency. Plaintiff was required to pay the delinquent rent.

### **CONCLUSIONS OF LAW**

A debt is nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A) to the extent that money, property, services, or an extension, renewal, or refinancing of credit, was obtained by--

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or insider's financial condition[.]

The burden of proof is upon the creditor to show by a preponderance of the evidence that the debt is nondischargeable. *Grogan v. Garner*, 111 S. Ct. 654, 59 (U.S. 1991). The creditor must show (1) the debtor made false representations with the intent to deceive; (2) the creditor justifiably relied upon the debtor's false representations; and (3) the creditor sustained a loss as a result of the misrepresentation. *Schweig v. Hunter*, 780 F. 2d 1577 (11th Cir. 1986); *St. Laurent v. Ambrose*, 991 F. 2d 672 (11th Cir. 1993); *City Bank & Trust Co. v. Vann*, 1995 WL 582036 (11th Cir. 1995).

Plaintiff asserts that Debtor's presentation at closing of the check for unpaid rent, together with all the surrounding facts and circumstances, constitute a representation that Debtor knew was false when it was made and that Debtor made the false representation with the intent to deceive and to induce Plaintiff to close the sale/lease assignment transaction. Therefore, an initial issue is whether the presentation of a check is a representation.

The case law is not well-settled. Several bankruptcy courts have held that a check is simply a negotiable instrument and constitutes no representation of intent or ability to pay. *See Roebuck Auto Sales, Inc. v. Mahinske*, 155 B.R. 547 (Bankr. N.D. Ala. 1992); *Tusco Grocers, Inc. v. Coatney*, 185 B.R. 546 (Bankr. N.D. Ohio 1995); *Mandalay Resort Group v. Miller*, 310 B.R. 185 (Bankr. C.D. Cal. 2004). Several of those cases rely on the case of *Williams v. U.S.*, 458 U.S. 279 (1982), in which the Supreme Court held that a check is not a representation. *Williams*, however, was interpreting a non-bankruptcy, criminal statute, and thus, its precedential value is extremely limited. *See Check Control, Inc. v. Anderson*, 181 B.R. 943 (Bankr. D. Minn. 1995).

The majority position, however, appears to be that the presentation of a check is a representation within the meaning of §523(a)(2)(A). *See Wegmans Food Market v. Smith*, 207 B.R. 403 (Bankr. W.D. N.Y. 1997); *Designed Flooring Distributors v. Wagenti*, 110 B.R. 602 (Bankr. S.D. Fla. 1990); *Taylor Electric Co. v. Ettinger*, 68 B.R. 993 (Bankr. E.D. Mich. 1987); *Anderson*, 181 B.R. 943. The *Wagenti* case is instructive because in that case, the debtor issued two worthless checks and later alleged that he instructed the creditor to hold the checks. The court nevertheless found that the debtor had made a false representation with the intent to deceive.

In the instant case, in addition to the check delivered by Debtor, Debtor also signed an affidavit representing that the business had no outstanding debts. Other circumstances support a

conclusion that Debtor made his false representation with an intent to deceive. At the time Debtor issued the check to Plaintiff, Debtor himself had received a check for \$27,500, yet he deposited that check in his business account while the check to Plaintiff had been drawn on his personal account. Additionally, when presented with the option of simply deducting the money owed for unpaid rent from the security deposit, which was included in the \$27,500 check issued to Debtor, Debtor declined, choosing instead to write a separate check. Debtor already knew that he had other outstanding obligations to satisfy using the sale proceeds, not the least of which was employees' salaries.

Having established that Debtor's presentation of the check was a false representation, that Debtor knew it was false, and that Debtor made the false representation with an intent to deceive, the facts show clearly that Plaintiff justifiably relied on Debtor's false representations and, as a result, Plaintiff sustained a loss. Accordingly, judgment will be entered in favor of Plaintiff in the amount of \$3,446.75 plus the costs of this action, \$150, and the magistrate's court costs of \$102.50, for a total of \$3,699.25.

IT IS SO ORDERED this the \_\_\_\_\_ day of March, 2005.

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MARGARET H. MURPHY  
UNITED STATES BANKRUPTCY JUDGE